No. 10-262

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM WILCOX and
SHIRLEY WILCOX, his wife,

Petitioners,

vs.

JEREMIAH FENN, OSCAR GILLIAM, and
DOUGHERTY COUNTY, GEORGIA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the substantive component of the Due Process Clause of the Fourteenth Amendment is implicated when a police officer's alleged speeding on a highway, without more, causes a motor vehicle accident with a member of the general public under circumstances not involving an emergency, a response to a call for service, or a pursuit.

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OPINIONS AND JUDGMENT BELOW

The appendix to the petition includes the March 30, 2009 order of the United States District Court for the Middle District of Georgia granting respondents' motion for judgment on the pleadings. (Pet. App. at 6-20.) The district court entered judgment for respondents on the same day. (Pet. App. at 21-22.) The appendix to the petition also includes the May 25, 2010 decision and opinion of the United States Court of Appeals for the Eleventh Circuit affirming, per curiam, the district court's judgment. (Pet. App. at 1-5.) The Eleventh Circuit's opinion is not reported, but it may be found in the *Federal Appendix* at 380 F. App'x 837 and on Westlaw at 2010 WL 2073182.

STATEMENT OF JURISDICTION

Respondents agree that the Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this case involves a claim brought under 42 U.S.C. § 1983 based on an alleged violation of the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Bearing in mind that all plausible factual allegations in the complaint must be accepted as true in the context of a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, respondents agree with petitioners' statement of the case.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[a] petition for a writ of

certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Petitioners seek review of this case for three reasons: First, they contend that the Eleventh Circuit's decision conflicts with this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and should be summarily reversed. SUP. CT. R. 10(c) (providing that the Court may review a case when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). Second, they contend that there is a split among the circuits on the question presented and that this Court should resolve the split. SUP. CT. R. 10(a) (providing that the Court may review a case when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"). Third, they contend that this case "presents a clean vehicle with which to resolve these conflicts." (Pet. at 6.)

Contrary to petitioners' arguments, the Eleventh Circuit's decision does not conflict with *Lewis* and should not be summarily reversed. Moreover, there is no conflict among the circuits regarding the applicability of the Due Process Clause under the circumstances presented by this case. Petitioners have attempted to manufacture a conflict, but a close examination of the authority cited in support of the supposed conflict shows that there is no actual conflict. Finally, whether a case is a "clean vehicle" is not a reason recognized by Rule 10 for granting a petition for a writ of certiorari, and so respondents will not

further address this reason. Thus, there is no compelling reason for the Court to grant the petition.

A. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *LEWIS* AND SHOULD NOT BE SUMMARILY REVERSED

In *Lewis*, the Court held that "high-speed chases with no intent to cause harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." 523 U.S. at 854. In so holding, the Court explained that a deliberate indifference standard, which is applicable in some other § 1983 contexts, does not apply in cases involving a high-speed chase because actual deliberation is not practical. *Id.* at 848-53. From this, petitioners extrapolate that *Lewis* therefore holds that the deliberate indifference standard is to be applied whenever there *is* time for actual deliberation, even if the "deliberation" involves nothing more than the police officer's decision to exceed the speed limit while driving in a non-emergency, non-pursuit situation. This is not the holding of *Lewis*.

Because *Lewis* does not articulate a culpability standard which is applicable to the facts of this case, the Eleventh Circuit could not have applied the wrong standard based on *Lewis*. Petitioners are fixated on when *Lewis*'s standard of intent to injure applies compared to when the lower standard of deliberate indifference applies. But in focusing on that issue, petitioners are avoiding the real issue in this case, which is whether respondents' conduct even

implicates the Fourteenth Amendment in the first place. To determine this, it is necessary to examine the purpose of the Fourteenth Amendment.

The history of the Due Process Clause shows that its purpose was "to prevent government from abusing its power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (punctuation and internal quotation marks omitted). Indeed, "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Thus, the Court has categorically rejected negligence as a basis for finding that a public official has deprived someone of his rights under the Fourteenth Amendment. *Id.* at 330-31; *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials."). Otherwise, the Due Process Clause would be implicated whenever a public official commits a tort, and the Fourteenth Amendment would be nothing more than "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Such an expansive view of the Due Process Clause would trivialize its lofty status as a constitutional provision. The interests that it protects must

be greater in significance than those protected by the tort law of the various states. While the Court has consistently recognized this, *Collins*, 503 U.S. at 128 (noting that the Court has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law"), petitioners would have the Court diminish the importance of the Due Process Clause by having it implicated in what is nothing more than a garden-variety motor vehicle accident, albeit one involving a police car. Respondents acknowledge that a public official could violate the Due Process Clause if he intends to injure someone with his vehicle, as *Lewis* contemplates, or, perhaps, if he intentionally misuses his vehicle as an instrument of oppression toward someone, as the Fifth Circuit contemplated in *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (cited in *Lewis*). However, petitioners do not allege that respondents intended to injure them, and as the district court held, respondents' conduct was in no sense directed at petitioners. (Pet. App. at 17.)

Respondents submit that motor vehicle accidents such as this should be governed by state tort law, not the Constitution of the United States. Indeed, the Court has rejected previous attempts to transform every accident involving a public official into a constitutional tort implicating the Due Process Clause. In *Parratt v. Taylor*, the Court noted that "under this rationale any party who is involved in nothing more than an automobile accident with a state official

could allege a constitutional violation under § 1983." 451 U.S. 527, 544 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). And in *Paul*, the Court noted that "it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983." 424 U.S. at 698. The clear import of these decisions is that motor vehicle accidents that happen to involve public officials do not trigger the protections of the Due Process Clause in the absence of some purposeful, conscience-shocking conduct by the public official which is directed at the person injured.[1]

Stated another way, there is no reason why a simple tort such as negligently causing a motor vehicle accident should assume constitutional proportions simply because the driver was a public official. *Id.* (noting that "if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law"). Other analogies illustrate the point. For example, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Similarly, "false imprisonment does not

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[1] The Seventh Circuit has described a claim based on a motor vehicle accident as "a paradigm of the absurdity which could result from an overly broad interpretation of § 1983." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996).

become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). As in *Estelle* and *Baker*, respondents' conduct may have been negligent, or even grossly negligent, but whether it was or was not is irrelevant to the constitutional analysis. In the end, petitioners must look to Georgia tort law for their remedy.

Even if respondents' conduct were characterized as reckless, the conclusion would be the same.[2] Reckless conduct is not purposeful conduct. "Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331. Thus, the Due Process Clause is implicated only when allegedly unconstitutional conduct is directed at the person harmed. It is not enough for the public official to be aware of a generic danger faced by the public at large; rather, the public official must know that the specific person injured faces a particularized danger. *Martinez v. California*, 444 U.S. 277, 285 (1980) ("Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger."). Petitioners' allegations of recklessness do not suffice to establish constitutional liability in the context of

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[2] Petitioners allege that respondents were reckless in that they exceeded the posted speed limit by at least twenty miles per hour and that they were aware of the risk of injury to other motorists on the road. (Pet. App. at 28.)

this case because there is no corresponding allegation that respondents' reckless conduct was somehow directed at petitioners.

Decisions by the Fifth, Seventh, and Eleventh Circuits support the view that motor vehicle accidents not involving some purposeful conduct directed at the person injured do not implicate the Due Process Clause. In *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), a police officer collided with another vehicle while traveling through an intersection at 73 miles per hour. The officer was not pursuing a suspect or responding to an emergency call, and he had not activated the lights or siren on his vehicle. The Eleventh Circuit acknowledged that the officer may have been negligent or even grossly negligent, but it held that there was no constitutional violation "simply because [the officer] was speeding in the absence of an emergency response or police pursuit." *Id.* at 1381.

Similarly, in a case where a police officer killed a person when he ran a red light while speeding and not using his vehicle's headlights, emergency lights, or siren, the Seventh Circuit held that "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996). The Seventh Circuit also held that "[i]t is insufficient to show that a public official acted in the face of a recognizable but

generic risk to the public at large." *Id.* at 421-22. Relying in part on the Seventh Circuit's opinion in *Hill*, the Fifth Circuit held that the Due Process Clause was not implicated in a case where a police officer struck and killed a pedestrian while speeding through an intersection in response to a non-emergency call. *Daniels v. City of Dallas*, 272 F. App'x 321, 322-23 (5th Cir. 2008) (per curiam).

To bring the analysis full-circle, respondents note that the Court did not alter the core principles of its substantive due process jurisprudence in *Lewis*. Indeed, the Court reaffirmed the notion that the Fourteenth Amendment is not a font of tort law and that not every common-law tort duty was constitutionalized in the Due Process Clause. *Lewis*, 523 U.S. at 848-49. The threshold question under the Due Process Clause is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may be said to shock the contemporary conscience." *Id.* at 847 n.8. Respondents' alleged behavior in this case – speeding along on a highway – is not so egregious or outrageous as to shock the conscience. Respondents may have been negligent, grossly negligent, or even reckless, but this Court's own precedent, as well as precedent from several courts of appeal, indicate that such conduct in the context of what is otherwise a routine motor vehicle accident does not implicate the Due Process Clause. Simply put, more is required to convert a motor vehicle accident that just happens to involve a public official into a matter of constitutional dimensions.

By no means do respondents intend to minimize the consequences of the accident, nor do they suggest that the Court should condone speeding by police officers in non-emergency, non-pursuit situations. The circumstances of this case are unquestionably tragic, but the gravity of a person's injuries should not be the sole determinant of whether a case implicates the Constitution. Instead, it is the nature of the public official's conduct which determines whether the Constitution is implicated, and in this case, respondents' conduct falls far short of the threshold required to implicate the Due Process Clause. As the Court observed in *Daniels*, "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." 474 U S. at 333.[3]

B. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED BY THE PETITION

Petitioners also argue that the Court should grant their petition to resolve a conflict among the circuits as to which standard – intent to injure or deliberate indifference – applies to cases involving motor vehicle accidents that occur in non-emergency, non-pursuit situations. Respondents acknowledge

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[3] In fact, petitioners have an adequate remedy under Georgia tort law, which they are currently pursuing in the Superior Court of Dougherty County, Georgia.

that a circuit split is a compelling reason for the Court to grant a petition for a writ of certiorari, *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."), but petitioners have not shown that a circuit split exists on the question presented by this petition. In light of petitioners' failure to demonstrate that there is a disagreement among the circuits on this question, the Court should deny the petition.

Petitioners have contrived a supposed conflict between the Eleventh Circuit and some of the other circuits, but there is no actual conflict in the context of cases such as this involving simple motor vehicle accidents arising out of non-emergency, non-pursuit situations. Petitioners cite to a number of cases in which the courts generally discuss the culpability standard to be applied in substantive due process cases. In those cases, the courts have held that the higher standard of intent to injure applies only when there is no time for deliberation and split-second, highly pressurized decisions must be made, and that a lower standard of deliberate indifference applies when there is time for deliberation and split-second, highly pressurized decisions are not necessary. According to petitioners, the Eleventh Circuit applied the higher standard of intent to injure in this case, even though respondents had ample time to deliberate

about how to drive and were not required to make a split-second, highly pressurized decision.

There are two problems with petitioners' argument: First, all of the cases cited by petitioners are factually dissimilar to this case. Those cases involve police pursuits, conduct of off-duty police officers, student suicides, emergency calls, public employment, and withholding of exculpatory evidence. None involved a motor vehicle accident allegedly caused by the tortious conduct of an on-duty police officer in a non-emergency, non-pursuit situation. Second, the Eleventh Circuit did not specifically hold in this case that the higher standard of intent to injure governed petitioners' substantive due process claim. Instead, it held that petitioners could not maintain their substantive due process claim because respondents' conduct "was not so 'egregious' as to be 'arbitrary in the constitutional sense.'" (Pet. App. at 4.)

The Eleventh Circuit's holding in this case, like the holdings of the Fifth and Seventh Circuits in *Daniels* and *Hill*, and like its own prior holding in *Rooney*, was simply that respondents' conduct does not implicate the Due Process Clause. The standard of fault to be applied was not even reached because it was not necessary for the Eleventh Circuit to do so. This is consistent with this Court's recognition in *Parratt* and *Paul* that motor vehicle accidents involving public officials do not trigger the protections of the Due Process Clause in the absence of some purposeful conduct which is directed at the person

injured. Thus, there is no split among the circuits that needs to be resolved by the Court.

CONCLUSION

Petitioners have not presented any compelling reason why the Court should grant the petition, as required by Rule 10. Accordingly, the Court should deny the petition.

Respectfully submitted,

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